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KHETTRA-
MOHAN CHAT-
TERJEE

v.

KISORIMOHAN
BOSE.

The plaintiff appealed on the following grounds: *1st*, that the learned Judge was wrong in holding that the plaint did not seek for equitable relief as between mortgagor and mortgagee by way of foreclosure or sale, which could be only granted by this Court. *2nd*, that the learned Judge was wrong in holding that the relief sought for by the plaintiff in this suit could have been granted by the Court of Small Causes.

Mr. Woodroffe for appellant.

The judgment of the Court was delivered by

PEACOCK, C. J.—I think there is no reason for interfering with the judgment. The plaintiff might have brought his suit in the Small Cause Court for the sum due on the mortgage, or he might have exercised the power of sale under it.

Judgment affirmed.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Phear.

MANOHAR DAS AND OTHERS, APPELLANTS, v. BHAGABATI DAS,
RESPONDENT

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Sept. 5

Hindu Widow—Execution of Deed—Fraud—Error in evidence.

See also 15 B. L. R. 183 In a suit by a Purda lady to set aside a bill of sale, execution of which by her had been obtained by collusion and fraud, the Court admitted parol evidence to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for.

THE plaintiff in this suit prayed, that the defendants might be directed to bring the bill of sale, or agreement for sale, of certain premises in Zig-Zag Lane, in Calcutta, into Court, and that the document might be declared to be a security only for the sum of Rs. 8,000; and that the defendants might account for the rents and profits of the premises, and the plaintiff might be charged in account on the sum of Rs. 8,000, with interest at 12 per cent. only, and on payment of what might be a found due from her, might have the premises re-conveyed to her and possession thereof.

The plaint charged that the deed had been obtained by fraud and with the collusion of the plaintiff's manager, Haris Chandra Biswas.

The plaintiff, a Hindu lady of rank, alleged that she was in possession of certain property in Zig-Zag Lane, in Calcutta, as mother and heiress of one Bir Chand Neogy, who died in 1846; that in November 1859, she applied, through her agent, Haris Chandra Biswas, to one Jamuna Das, the manager of the firm of Harnam Das and Jamuna Das, in which the defendants were interested, for an advance, which was agreed to, on re-payment being secured by the execution of a bill of sale of the property, for Rs. 8,000; that she had not, throughout the negotiations and transactions, in respect of which she sought relief, any independent or efficient legal adviser, and was, moreover, as a purda lady, wholly ignorant of business and of the true and adequate value of the premises intended to be conveyed or mortgaged by her; that she agreed to execute the aforesaid bill of sale to the said Jamuna Das, acting as such manager of the joint family, of which he is a member, upon the representation and assurances made to her by the said Jamuna Das, corroborated by the assertions of the said Haris Chandra Biswas, that the sum of Rs. 8,000 was the true value of the property, and that on payment of the sum advanced, with interest at the rate of 12 per cent., the said property to be conveyed under the said bill of sale would be re-conveyed to her; and that Jamuna Das also assured the plaintiff that in lieu of the interest payable thereon, the rents and profits thereof would be received, and that although the mortgage would contain a clause charging interest at 24 per cent., the real rate between the parties should be that already agreed upon, namely 12 per cent. That the bill of sale and deed of mortgage were executed by the plaintiff on the 22nd of December 1859, and she then, through her manager, let Jamuna Das into possession of the property in Zig-Zag Lane.

The defendant, Ramkrishna Das, the representative of Jamuna Das, since deceased, and the other defendants alleged that Mr. P. J. Paul acted as attorney for the plaintiff, during the transactions in question, and approved the bill of sale on

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her behalf, and contended that the deed operated as an absolute conveyance.

The Judgment of the lower Court was delivered by

NORMAN, J.—The facts of this case distinguish it from that of *Kashinath Chatterjee v. Chandi Charan Banerjee* (1). Bhagabati Dasi wanted money to pay off a mortgage debt; Haris Chandra Biswas says, that the proposal for the sale of the Zig-Zag Lane property emanated from the plaintiff; that in order to raise the money, she wanted to sell the property in the first instance. That is contrary to the evidence of the plaintiff and to other evidence given by Haris Chandra Biswas in the case. The plaintiff's evidence is almost unsupported by other evidence, but as given in the witness box, it tallies closely with the story told in her plaint and written statement, *viz.*, that Jamuna Das was to take this property, receive the rents instead of interest, and when the mortgage debt was paid off, he should have an opportunity of buying it, if he wished, or if he did not buy, he would re-convey to her; that I am convinced was her understanding at the time; that is the story told by her; it is contradicted by two or three witnesses, all of whom I consider unworthy of credit, when their evidence is opposed to that of the plaintiff. It is conclusively proved that Mr. Paul was not acting as attorney for Bhagabati, but for Jamuna Das, by whom his bill was paid. It is clear that, as regarded the bill of sale, no one acted as attorney for Bhagabati Dasi, no one perused it for her, or attended the execution of the deeds on her behalf. The conduct of Jamuna Das bears the grossest marks of fraud. I must pronounce that the transaction was a mortgage, and that the house in Zig-Zag Lane must be declared to stand only as a security for the sum of Rs. 8,000.

A decree was, accordingly, given in the terms of the prayer of the plaint.

From this decision, the defendants appealed on the ground, that the Judge allowed the plaintiff to give parol evidence contradicting a written document which, on her own showing,

(1) Case No. 870 of 1865, 5th February 1866.

had been knowingly and intentionally executed by her; and generally on the merits.

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The *Advocate General* and Mr. *Eglinton* for the appellants.

Mr. *Lowe* and Mr. *Woodroffe*, for the respondent, relied on the case of *Kanai Lal Jowhari v. Kamini Debi* (1).

(1) This case is not reported. The following was the judgment therein by

Phear, J. (February 21st 1867).— I will first mention very shortly the leading facts of the case. On the 20th March 1852, Kamini Debi then a widow, instituted a suit against certain persons, to obtain her husband's share in the estate of his adopted father. To obtain the necessary funds, she applied to Sarada, and an engagement was entered into, by which Sarada undertook the prosecution of this suit on behalf of Kamini Debi, as well as all other suits necessary to her interests, and to provide all necessary moneys for these purposes, and for the maintenance of Kamini.

In consideration of this undertaking, Kamini agreed to repay Sarada such advances as he had made, and Rs. 2,000 in addition, for his remuneration, in the event of success. This contract was entered into on the 8th February 1855. On the same date, Kamini executed a bond in the penal sum of Rs. 20,000, conditioned to be void on payment to Sarada of all moneys advanced to him on account, to be taken together with interest at 12 per cent, per annum, and Rs. 20,000 within one month after she succeeded in the con-

templated suits and obtained her share. On the same day she also executed a power to Sarada, who, on this footing, became her agent and manager in regard to all the property which was the subject of the suits. In March 1857, accounts were in some sort settled between Kamini and Sarada; and it was agreed that Rs. 13,700 was the balance due to Sarada, as on the preceeding 4th March; and Kamini assigned to Sarada all the property to which she was entitled under the will and certain other decrees, on the condition that if she, Kamini, paid Sarada Rs. 13,700, together with interest thereon, at the rate of 2 per cent per annum, from the 4th March, the date of the settled account, and all such further sums as Sarada might advance within one month from the termination of the suit pending in the Supreme Court, in which S. M. Kamini Debi was plaintiff, and Bindu Basini and others were defendants, whether by final decree, amicable settlement, or otherwise; and in case of success in the suit, should pay to Sarada Rs. 20,000 within one month from the termination of the said suit, by amicable arrangement or otherwise, then this assignment should be void. So it stood between Kamini and Sarada. Afterwards, in alleged

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PEACOCK, C. J.—This is a very different case from that of *Kashinath Chatterjee v. Chandī Charan Banerjee* (1). I concur in the consideration of a debt due from Sarada to the plaintiff, on a bond dated 2nd August 1858, Sarada executed, on the 13th April 1866, a transfer of all the premises assigned to him in Kamini's mortgage of 1857, absolutely, subject only to any equity of redemption which Kamini might have under the deed of assignment of the 26th March 1857, and also a transfer of the mortgage debt. The same deed of transfer further contained a power of attorney to Kanai Lal, and a covenant by the latter to pay over all surplus after paying himself Rs. 10,000 and costs. It has not been contended, on behalf of the defendant seriously, that she did not, in fact, execute the several deeds of 1852, 1855, and 1857. This being so, what is the effect of the assignment of 13th April 1866? It appears to me that notwithstanding a certain omission in this deed, the effect of it was to make Kanai Lal, as against Sarada, mortgagee of all the property which Sarada took under the deed of 1857, subject to all rights of redemption which Kamini might have against Sarada. This places Kanai Lal in the place of Sarada, as he stood against Kamini in 1866, having regard to the deed of 1857, and subject to the like equities of Kamini. Kanai Lal is, therefore, entitled to sue Kamini on the original mortgage of 1857, as if he were Sarada, but he is bound to make Sarada co-defendant, as Sarada is entitled to have the opportunity of redeeming, if he chooses. That being so, the first head of the defendant Kamini's defence is, that the deed of 1857 is not binding on her, on the ground that at the time of the execution, she was acting without sufficient advice, and in ignorance of the effect of what she was doing; and the second, that Sarada, after the mortgage in 1857, and before the assignment of 1866, namely in 1858, became a convicted felon, and that consequently all his interest, under the deed of 1857, *ipso facto* passed out of him into the Crown, so that, in April 1866, he had nothing to pass to Kanai Lal, and Kanai Lal took nothing. As a matter of fact, however, the Crown has taken no step whatever to reduce into possession any of the property, rights, or interests of Sarada which the alleged forfeiture might have given it, and is no party to the suit. These issues raise very important points for consideration, but I must dispose of the case on the first objection. I may remark that I have more than once felt myself obliged to hold that a Hindu purda woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are especially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated,

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generally in the remarks made by Mr. Justice Phear in the case of *Kanai Lal Jowhari v. Kamini Debi*, as to native

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always incumbent on the person who is interested in upholding the transactions, to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party. I would refer in support of this position to *Baker v. Monk*, 33 Beav. 419; *Clerk v. Malpas*, 31 Beav., 80; *Evans v. Llewelyn*, 1 Cox, 333.

Further, for the like reason, the same burthen of proof lies on any one who, standing before the Court, in reliance upon a contract made with any one, whether *purda-nishin* or other, towards whom he is in any fiduciary position relating to the subject of contract. Now the case before me comes within both these rules, for not only was Kamini a strict *purda-nishin*, but Sarada was her attorney and agent plenipotentiary in regard to all the property and interests which formed the subject of the mortgage: It seems to me impossible to say that, in the contract of 1857, Kamini was in any respect at arm's length from Sarada, or had any proper advice. There is no attempt to show that it was a reasonable and proper arrangement between the parties; on the other hand, there is much appearing on the face of the transaction itself to show that there was no sufficient reason why the mortgage should ever have been executed. Sarada had two years before found herself to make the advances which form the subject of the security. There is not a tithe of evidence that he could not recover the money, the money which he had paid according to the term of the original contract. The only consideration suggested to me takes the shape of those very advances he was otherwise bound to make. Then, again, as to the amount of the alleged arrears, there is no evidence bearing upon it beyond the admission of Kamini herself that that amount was due. Sarada dared not pledge his oath that a fraction of it was due. He, the lady's agent and trustee in the fullest sense, bound to keep complete accounts, could produce no document in support of it, and could not explain or give any reason for the absence even of the slightest memorandum. Kamini's admission, of course, stands on the same footing, as the transaction of which it is intended to constitute justification. It must at least be shewn that she made the admission with a full knowledge of the facts. I cannot say that the evidence of Mr. Gillanders' clerk shows that, or any thing like it. Nor was his conduct altogether what it should have been. The moment he had a suspicion in the matter and he tells us that he did early form a suspicion, he should have stood back till Kamini was separately represented by an independent adviser in the negotiations. In truth, this unfortunate *purda-nishin* had no advice at all, unless it was that of the person with whom she was contracting, and who, it seems, would have no scruples in taking undue advantage

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Purda ladies, and also in the views expressed by Mr. Justice Norman in this case.

PHEAR, J.—I concur.

Judgment affirmed with costs.

Attorneys for the appellants : *Messrs. Swinhoe, Law, & Co.*

Attorneys for the respondents : *Messrs. P. C. Bonnerjee, and Bonnerjee, and Bose.*

of her; for I cannot lose sight of the fact, that within a few months of this time, Sarada was convicted of a very gross fraud on this lady, and suffered the punishment of transportation in consequence. Under the circumstances which I have detailed, careful consideration compels me to say, that if the lady had come into Court to impeach the contract of mortgage itself, and to ask that it be set aside, the Court must have granted her petition. Instead of her doing this, however, the other side comes into Court to seek for its assistance towards obtaining the full benefit of the mortgage—assistance which will only be given upon equitable grounds. That no such equity can exist in favour of one, as against whom the Court would set aside the deed, is obvious, and the plaintiff cannot, in this respect, stand in a better position than Sarada himself. I am, therefore, bound to say that this Court will refuse this application,

as it appears to me that the proper remedy for the false position in which the parties now stand towards each other, would have been for the lady to apply to be relieved from the burden of the mortgage. It has occurred to me that it might be useful, if I were to suspend the decree of dismissal of this suit till the lady has had an opportunity for bringing her suit to be relieved from the deed. There are other considerations arising out of the facts of the case, such as the lapse of time, &c., which influence me in the same direction as those I have mentioned, but I need not go into them at length now, for I have said enough to explain the grounds on which my decision is based. I will, for the present, confine myself to saying that this suit will be dismissed, with costs No. 2, but I will hold the actual decree for a few days to allow time for action being taken by the other side,